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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 226.

FRANK M. FAIRBANK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED MARCH 19, 1900.

(17,676.)

24228

(17,676.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 14, 1900.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the district court of the United States for the district of Minnesota, fourth division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the March term, 1900, thereof, between United States of America, plaintiff, and Northern Pacific Railway Company and Frank M. Fairbank, defendants, a manifest error hath happened, to the great damage of the said defendant, Frank M. Fairbank, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, District of Columbia, and filed in the office of the clerk of the Supreme Court of the United States on or before the 11th day of April, A. D. 1900, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of March, A. D. 1900.

Issued at office, in Minneapolis, Minnesota, with the seal of the circuit court of the United States for the district of Minnesota, fourth division.

[Seal U. S. Circuit Court, Dist. of Minnesota, Fourth Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

Allowed by—
WM. LOCHREN, *Judge.*

UNITED STATES OF AMERICA, *District of Minnesota, Fourth Division,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the district court of the United States for the district of Minnesota, fourth division.

Seal U.S. Dist. Court, Dist. of Minnesota, Fourth Division.

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for District of Minnesota.

[Endorsed:] Original. United States district court, district of Minnesota, fourth division. United States of America *vs.* Northern Pacific Railway Company and Frank M. Fairbank. Writ of error. Filed 12 o'clock m. March 12th, 1900. Charles L. Spencer, clerk.

2 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error filed in the clerk's office of the district court of the United States for the district of Minnesota, fourth division, wherein Frank M. Fairbank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated March 12, 1900.

WM. LOCHREN,
District Judge.

Due service of the above citation is hereby admitted this 12th day of March, 1900.

ROBERT G. EVANS,
United States District Attorney.

[Endorsed:] Original. United States district court, district of Minnesota, fourth division. United States of America *vs.* Northern Pacific Railway Company and Frank M. Fairbank. Citation. Filed March 12th, 1900. Charles L. Spencer, clerk U. S. district court, district of Minnesota.

3 *Pleas before the Honorable William Lochren, Judge of the District Court of the United States for the District of Minnesota.*

District Court of the United States, District of Minnesota, Fourth Division.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE NORTHERN PACIFIC RAILWAY COMPANY and FRANK M. Fairbank, Defendants.

Be it remembered that at the stated March term, A. D. 1900, of said court, begun and held at the city of Minneapolis, in said dis-

trict, in the fourth division thereof, on, to wit, the 6th day of March, A. D. 1900, the grand jury of the United States of America within and for said district and division, on, to wit, the 6th day of March, A. D. 1900, of said term, came into open court and presented their certain bill of indictment against the Northern Pacific Railway Company and F. M. Fairbank, which was filed of record in said court and is in the words and figures following, to wit:

District Court of the United States of America for the District of Minnesota, Fourth Division.

At a stated term of the district court of the United States of America for the district of Minnesota, fourth division, begun and held at the city of Minneapolis, within and for the district and division aforesaid, on the first Tuesday in March, being the
4 sixth day of March, in the year of our Lord one thousand nine hundred, by a duly empanelled, charged, and sworn grand jury of the United States of America within and for said district and division, it is presented in manner and form following—that is to say:

DISTRICT OF MINNESOTA, *ss*:

The grand jury of the United States of America within and for said district and division on their oath present that during all the times herein mentioned the Northern Pacific Railway Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and a common carrier, having its principal place of business in the city of Saint Paul, in the county of Ramsey, in the State and district of Minnesota, and that during all the times herein mentioned said corporation and common carrier was and now is engaged in the transportation of property and merchandise by railroad from the city of Minneapolis, in the county of Hennepin, in the State and district of Minnesota, to the city of Duluth, in said State and district of Minnesota, and that during all the times herein mentioned the said Northern Pacific Railway Company, a corporation and common carrier, as aforesaid, was and now is engaged in the transportation of property and merchandise by railroad and steam vessels in connection with other common carriers, which other common carriers are hereinafter more fully described, by a continuous carriage or shipment from said city of Minneapolis by the way of said city of Duluth to that certain foreign port, to wit, the city of Liverpool, in the Kingdom of Great Britain.

That during all the times herein mentioned the Western Transit Company was and now is a corporation and common carrier engaged in the transportation of property and merchandise by steam vessels from the city of Duluth, in the State and district of Minnesota, to the city of Buffalo, in the State of New York, and that during all the times herein mentioned the New York Central and Hudson River Railroad Company was and now is a corporation and common carrier and engaged in the transportation of property and

merchandise from the city of Buffalo, in the State of New
5 York, to the city of Albany, in the State of New York, and that during all the times herein mentioned the Boston & Albany Railroad Company was a corporation and common carrier and engaged in the transportation of property and merchandise by rail from the city of Albany, in the State of New York, to the city of Boston, in the State of Massachusetts, and that during all the times herein mentioned the Leyland steamship line was and is a corporation and common carrier and engaged in the transportation of property and merchandise by steam vessels from the city of Boston, in the State of Massachusetts, to foreign ports, and especially to the port of Liverpool, in the Kingdom of Great Britain.

That during all the times herein mentioned one F. M. Fairbank was and now is the duly appointed, qualified, and acting agent and shipping clerk of the said Northern Pacific Railway Company, a corporation, as aforesaid, at the city of Minneapolis, in the county of Hennepin, in the State and district of Minnesota, and that the said F. M. Fairbank was also during all the times herein mentioned the duly appointed, qualified, and acting agent of the corporations and common carriers hereinbefore described and of each of them at said city of Minneapolis, county and State aforesaid, and that the said F. M. Fairbank, as the agent and shipping clerk of the said Northern Pacific Railway Company, was duly authorized by said Northern Pacific Railway Company to accept and receive property and merchandise at said city of Minneapolis for continuous carriage and transportation by the said Northern Pacific Railway Company, in connection with the corporations and common carriers hereinbefore described, from said city of Minneapolis, in the State and district aforesaid, to the said port of Liverpool, in the Kingdom of Great Britain, and that the said F. M. Fairbank during all the times herein mentioned was duly authorized and empowered by the said Northern Pacific Railway Company, a corporation, as aforesaid, and each of the companies, corporations, and common carriers hereinbefore described to make, issue, and sign as the agent of the Northern Pacific Railway Company and each of said companies export bills of lading in receipt for property and merchandise so received by the said Northern Pacific Railway Company at the city of Minneapolis aforesaid for carriage and continuous transportation from said
6 city of Minneapolis to said city of Liverpool, in the Kingdom of Great Britain, by said corporation, to wit, the Northern Pacific Railway Company, in connection with other common carriers, as aforesaid.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 28th day of February, A. D. 1900, at the city of Minneapolis, in the county of Hennepin, in the State and district of Minnesota, the said Northern Pacific Railway Company, a corporation and common carrier, as aforesaid, and each of the corporations and common carriers hereinbefore described and the said F. M. Fairbank, as the agent of the said Northern Pacific Railway Company, did accept, take, and receive into their possession, custody, and control at the through freight rate of thirty-five cents per hundred-

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weight for continuous shipment and carriage by the said Northern Pacific Railway Company, a corporation, as aforesaid, in connection with the common carriers and corporations hereinbefore described, from said city of Minneapolis, in the county and State aforesaid, to a foreign port, to wit, the city of Liverpool, in the Kingdom of Great Britain, a large quantity of wheat in bulk, to wit, fifty thousand pounds, from the Monarch Elevator Company, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and which said Monarch Elevator Company, a corporation, as aforesaid, was then and there engaged in the elevator business, to wit, the buying, selling, storing, and shipping grain, and particularly wheat.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 28th day of February, A. D. 1900, at the city of Minneapolis, in the county of Hennepin, in the State and district of Minnesota, and within the jurisdiction of this court, the said Northern Pacific Railway Company, a corporation, as aforesaid, and the said F. M. Fairbank, the agent of said company, as aforesaid, did wilfully, unlawfully, and wrongfully make, issue, and sign, and cause to be made, issued, signed, and delivered to the said Monarch Elevator Company, a corporation, as aforesaid, a certain bill of lading and receipt (other than charter-party) for the said fifty thousand pounds of wheat in bulk received by the said Northern Pacific Railway Company and the said F. M. Fairbank, as aforesaid, for con-
7 tinuous carriage and exportation by the said Northern Pacific Railway Company in connection with the other corporations and common carriers hereinbefore described, as aforesaid, for the said Monarch Elevator Company, from said city of Minneapolis, in the State and district of Minnesota, to a foreign place, to wit, the city of Liverpool, in the Kingdom of Great Britain; which said bill of lading and receipt made, signed, issued, and delivered, as aforesaid, was then and there in the words and figures following, to wit:

(Here follows bill of lading marked p. 7.)

8 And which said bill of lading and receipt described, made, issued, signed, and delivered, as aforesaid, was not then and there duly stamped with an adhesive internal-revenue stamp for denoting the revenue tax imposed by law thereon, and which said bill of lading and receipt described, made, issued, signed, and delivered, as aforesaid, did not then and there bear and have thereon an adhesive stamp to denote the internal-revenue tax imposed and chargeable thereon, as required by an act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13th, 1898.

And the grand jurors aforesaid on their oaths aforesaid do say that the said Northern Pacific Railway Company, a corporation and common carrier, as aforesaid, at the time and place aforesaid, to wit, on the said 28th day of February, A. D. 1900, at said city of Minneapolis, was duly authorized and empowered by said corporations and common carriers hereinbefore described and each of them to make,

issue, sign, and deliver the said bill of lading and receipt to the said Monarch Elevator Company aforesaid and in the manner aforesaid.

And the grand jurors aforesaid upon their oaths aforesaid do further present that said bill of lading and receipt described, as aforesaid, and made, issued, signed, and delivered to the said Monarch Elevator Company, a corporation, as aforesaid, was not then and there a contract or agreement for the charter of any ship, vessel, or steamer, and was not then and there a letter, memorandum, or writing between the master, captain, or owner, or any person acting as agent of any ship, vessel, or steamer, and any other person or persons for or relating to the charter of any ship, vessel, or steamer, or any renewal or transfer thereof, which is against the peace and dignity of the United States and contrary to the form of the statutes in such case made and provided.

MILTON D. PURDY,
Assistant United States Attorney
for the District of Minnesota.

(Endorsed:) Indictment. A true bill. George R. Chipman, foreman of the grand jury. Names of the witnesses examined be-
9 fore the grand jury: John B. Baird. Milton D. Purdy, ass't United States district attorney. Filed March 6th, 1900. Charles L. Spencer, clerk.

And thereafter and on, to wit, the 7th day of March, A. D. 1900, the following proceedings were had, which were duly recorded in said court in the words and figures following, to wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1900.

MARCH 7TH, A. D. 1900—Wednesday morning.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, judge.

THE UNITED STATES *vs.* THE NORTHERN PACIFIC RAILWAY Company and Frank M. Fairbank.	Indictment under Secs. 7 and 25 of Act of June 13th, 1898.

And now the defendants in the above-entitled action appear at the bar of this court by Charles W. Bunn, Esq., their attorney, and also the said Frank M. Fairbank in his own proper person, and they are arraigned upon an indictment presented and filed against them at the present term of this court charging that on the 28th day of February, A. D. 1900, at the city of Minneapolis, in the county of Hennepin, in the State and district of Minnesota, they did then and there wilfully, unlawfully, and wrongfully make, issue, and sign a certain bill of lading for certain merchandise, to be exported from the said Minneapolis to a foreign port, which said bill of lading did

not then and there have an adhesive stamp thereon to denote the internal-revenue tax imposed thereon as required by law; and the said Frank M. Fairbank doth declare his true name to be Frank M. Fairbank; and the reading of said indictment having been expressly waived by the said attorney for the said defendants, for a plea to said indictment each defendant doth say that he is not guilty as charged therein.

Whereupon Milton D. Purdy, Esq., assistant United States attorney for the district of Minnesota, appears on behalf of the plaintiff and moves the cause for trial; and a jury, having been called, comes as follows, to wit, Daniel Kennedy, R. O. Hall, Magnus Norman, Charles Boe, Michael Kennedy, John Mullen, Willis Smith, Fred Lassow, R. E. Whitmore, P. W. Jesperson, A. N. Benson, S. P. Thorson, being twelve free and lawful men who are duly empanelled as a jury and sworn to try the issues joined herein.

Mr. Purdy opens the case on the part of the plaintiff.

John B. Baird is sworn and examined as a witness on behalf of the plaintiff.

And here the plaintiff rests its case.

No testimony is offered on the part of the defendant-, and the testimony is closed.

Counsel for each of the respective parties hereto waive the summing up of the case to the jury.

The jury is charged by the court, and retires, under the charge of an officer duly sworn to keep them, to consider of their verdict.

And thereafter the said jury is returned into open court, and, in the presence of the said defendant-, do render their verdict, wherein by their foreman they do say that they "do find the defendants, The Northern Pacific Railway Company and Frank M. Fairbank, guilty as charged in the indictment."

And thereupon the said defendants are asked by the court whether they have anything to say why judgment should not now be rendered and sentence pronounced in accordance with the verdict aforesaid, but neither they nor any one for them say anything in arrest thereof; whereupon, in accordance with said verdict, it is by the court considered and adjudged that each of said defendants is guilty of the crime aforesaid, and that as punishment therefor each of said defendants do pay a fine of twenty-five dollars ($25.00).

And thereafter and on the same day, to wit, the 7th day of March, A. D. 1900, the following paper was filed of record in said court; which said paper is in the words and figures following, to wit:

11 United States District Court, District of Minnesota, Fourth Division.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE NORTHERN PACIFIC RAILWAY COMPANY and Frank M. Fairbank, Defendants. } Verdict.

We, the jury in the above-entitled action, do find the defendants, The Northern Pacific Railway Company and Frank M. Fairbank, guilty as charged in the indictment.

JOHN E. MULLEN, *Foreman.*

(Endorsed:) Verdict. Filed March 7th, 1900. Charles L. Spencer, clerk.

And thereafter and on the same day, to wit, the 7th day of March, A. D. 1900, the following paper was filed of record in said court; which said paper is in the words and figures following, to wit:

District Court of the United States for the District of Minnesota, Fourth Division.

UNITED STATES OF AMERICA
vs.
NORTHERN PACIFIC RAILWAY COMPANY and F. M. FAIRBANK.

On the trial of this cause before the undersigned and a jury the following proceedings, among others, were had: After the impanelling of the jury and before any evidence had been offered the defendants and each of them objected to the introduction of any testimony under the indictment on the ground that the act of Congress of June 13, 1898, commonly called the war-revenue law, is void in so far as it imposes a stamp tax on foreign bills of lading upon the ground that to that extent it is in conflict with that provision
12 of article one, section nine, of the Constitution of the United States which provides "No tax or duty shall be laid on articles exported from any State."

The court overruled the objection, and the defendants and each of them then and there duly excepted, and such exception was allowed.

After the testimony was in and before the jury retired the defendants and each of them requested the court to charge the jury that the said jury must acquit the defendants and each of them on the ground that the act of Congress of June 13, 1898, commonly called the war-revenue law, is void in so far as it imposes a stamp tax on foreign bills of lading upon the ground that to that extent it is in conflict with that provision of article one, section nine, of the Constitution of the United States which provides "No tax or duty shall be laid on articles exported from any State."

The court overruled such requests, and the defendants and each of them then and there duly excepted to the ruling; which exceptions were allowed by the court.

Because the foregoing matters do not appear of record, the court, on the trial of this cause and on this day, has signed and sealed this bill of exceptions, and hereby makes the same a part of the record.

Dated March 7, 1900.

WM. LOCHREN, *Judge.*

(Endorsed:) Bill of exceptions. Filed March 7th, 1900. Charles L. Spencer, clerk.

And thereafter and on, to wit, the 12th day of March, A. D. 1900, the following paper was filed of record in said court; which said paper is in the words and figures following, to wit:

District Court of the United States for the District of Minnesota, Fourth Division.

UNITED STATES OF AMERICA)
v.
NORTHERN PACIFIC RAILWAY COMPANY and F. M. FAIRBANK.)

Assignment of Errors.

Now comes Frank M. Fairbank and assigns the following
13 errors in the judgment of this court in the above-entitled action:

1. The court erred in overruling this defendant's objection to the introduction of any testimony under the indictment for the reason that the act of Congress of June 13, 1898, commonly called the war-revenue law, is void in so far as it imposes a stamp tax on foreign bills of lading, to that extent being in conflict with that provision of article 1, section 9, of the Constitution of the United States which says, "No tax or duty shall be laid on articles exported from any State."

2. The court erred in refusing, after all the testimony was in and before the jury had retired, to charge the jury to acquit this defendant for the reason that the act of Congress of June 13, 1898, commonly called the war-revenue law, is void in so far as it imposes a stamp tax on foreign bills of lading, to that extent being in conflict with that provision of article 1, section 9, of the Constitution of the United States which says, "No tax or duty shall be laid on articles exported from any State."

Dated March 10, 1900.

C. W. BUNN,
Attorney for Frank M. Fairbank.

(Endorsed:) Assignment of errors. Filed March 12th, 1900. Charles L. Spencer, clerk.

And thereafter and on the same day, to wit, the 12th day of March, A. D. 1900, the following paper was filed of record in said court; which said paper is in the words and figures following, to wit:

District Court of the United States for the District of Minnesota, Fourth Division.

UNITED STATES OF AMERICA
v.
NORTHERN PACIFIC RAILWAY COMPANY and F. M. FAIRBANK.

Petition for Writ of Error.

Now comes Frank M. Fairbank, one of the defendants, and alleges that in the above-entitled cause the court in its decision
14 and judgment has committed a manifest error against the said Frank M. Fairbank, as will more fully appear upon the records of all the proceedings in said cause, and the undersigned prays a writ of error to the Supreme Court of the United States in accordance with law.

Dated March 10, 1900.

C. W. BUNN,
Attorney for Frank M. Fairbank.

Writ of error allowed.
WM. LOCHREN,
District Judge.

M'ch 12, 1900.

(Endorsed:) Petition for writ of error and allowance of said writ. Filed March 12th, 1900. Charles L. Spencer, clerk.

15 District Court of the United States, District of Minnesota, Fourth Division.

I, Charles L. Spencer, clerk of said district court, do hereby certify and return to the honorable the justices of the Supreme Court of the United States that the foregoing, consisting of fourteen (14) pages, numbered from 1 to 14, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said case entitled The United States of America, plaintiff, against The Northern Pacific Railway Company and Frank M. Fairbank, defendants, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, with admission by the United States attorney for said district of service thereof.

Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.

In witness whereof I have hereunto set my official signature as the clerk aforesaid and the seal of said district court, at the city of Minneapolis, in the fourth division of the district of Minnesota, this 14th day of March, A. D. 1900.

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

[10-cent U. S. internal-revenue stamp, canceled M'ch 14, 1900. C. L. S.]

[Endorsed:] United States district court, district of Minnesota, fourth division. The United States of America against Northern Pacific Railway Company and Frank M. Fairbank. Return to Supreme Court of United States on writ of error.

Endorsed on cover: File No., 17,676. Minnesota D. C. U. S Term No., 226. Frank M. Fairbank, plaintiff in error, *vs.* The United States. Filed March 19th, 1900.

No. 226.

OCT 1 1900

JAMES H. McKENNEY, Clerk

Brf. of Bunn for P. E. (on mo.)

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 1, 1900.

No. 226.

FRANK M. FAIRBANK,
Plaintiff in Error,

vs.

THE UNITED STATES.

MOTION TO ADVANCE.

C. W. BUNN,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 226.

FRANK M. FAIRBANK,
Plaintiff in Error,

vs.

THE UNITED STATES.

MOTION TO ADVANCE.

Plaintiff in error (with the Northern Pacific Railway Company) was indicted, tried and convicted in the district court of the United States for the district of Minnesota, of the charge of issuing, as agent of the railway company, an export bill of lading upon certain wheat exported through the port of Boston, Massachusetts, without affixing thereto an internal revenue stamp, as required by the war revenue act of June 13, 1898. In proper time and manner plaintiff in error objected at the

trial to introduction of any evidence against him thereat "on the ground that the act of Congress of "June 13, 1898, commonly called the war revenue "law, is void, in so far as it imposes a stamp tax "on foreign bills of lading, upon the ground that "to that extent it is in conflict with that provision "of article one, section nine, of the Constitution of "the United States which provides 'No tax or duty "shall be laid on articles exported from any state'," and requested the court to so charge.

The objection and request were overruled and exception duly taken (rec. 8). To review the judgment on conviction, and solely upon this constitutional ground, the present writ of error has been sued out.

The importance of the question and the magnitude of the commerce affected thereby are evident. The early decision of this court thereon is essential for the correct guidance of the public and the federal officials charged with the duty of enforcing the law. It is hence respectfully submitted that the case should be advanced for argument at such early date as the court may direct.

C. W. BUNN,

Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 226.

FRANK M. FAIRBANK,

Plaintiff in Error,

vs.

THE UNITED STATES.

Brief for Plaintiff in Error.

STATEMENT.

Plaintiff in error (with the Northern Pacific Railway Company) was indicted, tried and convicted in the District Court of the United States for the District of Minnesota, of the charge of issuing, as agent of the railway company, an export bill of lading upon certain wheat exported from Minneapolis, Minnesota,

to Liverpool, England, through the port of Boston, Massachusetts, without affixing thereto an internal revenue stamp, as required by the war revenue act of June 13, 1898. Transcript, p. 3. In proper time and manner plaintiff in error objected at the trial to introduction of any evidence against him thereat "on the ground that the act of congress of June 13, 1898, commonly called the war revenue law, is void, in so far as it imposes a stamp tax on foreign bills of lading, upon the ground that to that extent it is in conflict with that provision of article one, section nine, of the constitution of the United States, which provides, 'No tax or duty shall be laid on articles exported from any state,'" and requested the court to so charge.

Both the objection and request to charge were overruled and an exception duly taken to each ruling. Transcript, p. 8.

The plaintiff in error was convicted and sentenced to pay a fine of twenty-five dollars. Transcript, p. 7.

To review the judgment, and solely upon the above stated constitutional ground, the writ of error has been sued out.

ASSIGNMENT OF ERRORS.

The court erred:

1. In overruling the objection to the introduction of any evidence under the indictment.

2. In refusing the request to charge.

Each of said assignments is based on the ground that that provision of the act of congress imposing a ten-cent stamp tax on export bills of lading is void as

contravening section nine of article one, of the constitution of the United States, which says, "No tax or duty shall be laid on articles exported from any state."

ARGUMENT.

We submit that the question is not an open one under the decisions of this court. We think the case is controlled by *Brown v. State of Maryland,* 12 Wheat. 419, and *Almy v. California,* 24 How. 169.

Brown v. Maryland was decided in 1827, and has always been followed and regarded as giving the true construction (so far as concerns any question here involved) to that clause of the constitution now in question.

The case was this, as stated by Tawney, C. J., in *Almy v. California*:

> "The state of Maryland, in order to raise a revenue for state purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale, before they were authorized to sell, to take out a license, for which they should pay $50; and in case of refusal or neglect, should forfeit the amount of the license tax, and pay a fine of $100, to be recovered by indictment.
>
> "Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the state court, which sustained the validity of the state law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully con-

sidered by the court. And the court decided that this state law was a tax on imports, and that the mode of imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance."

The case therefore decides that a tax on the occupation of importer is a tax on imports.

Almy v. California involved a stamp tax imposed by the state of California upon bills of lading for gold or silver shipped to any place out of the state.

Mr. Benjamin argued that a stamp tax on the paper was not a tax on the export described in the paper. But this court said:

"If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the constitution of the United States, which in express terms declares that 'No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of

> the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance an effect, a duty on the article exported."

The case therefore decides that a stamp tax on a bill of lading is a tax on the goods described therein.

In *Woodruff v. Parham*, 8 Wall. 123, and *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590, it was held that the words "imports" and "exports" were used in the constitution of the United States as meaning articles shipped from or to a foreign country, and not articles shipped between the states. Therefore the one cent tax of the war revenue law upon interstate bills of lading is not obnoxious to this clause of the constitution.

It was held in *Woodruff v. Parham*, pp. 137-139, that *Almy v. California* was placed on the wrong ground; that as it involved a shipment from San Francisco to New York (not an export in the sense of this clause of the constitution) the decision should have been that the tax was invalid as being a burden on *interstate* commerce within *Crandall v. Nevada*, 6 Wall. 35. But the court reaffirms and repeats what was decided in *Almy v. California* to the point here involved, viz.: that a stamp tax on a bill of lading is a tax on the goods described therein. See p. 138.

> The question seems to us so well settled by the decisions of this court that it is unnecessary to go at length into the history of this provision, or the reasons

which actuated the framers of the constitution. But while believing it wholly unnecessary, we may be permitted to briefly indicate the history and purpose of the constitutional provision.

It is well known that all the provisions of the federal constitution respecting taxation were adopted after long and heated discussion and were compromises between widely opposing views and interests. The power of congress and the power of the states to levy duties on imports were discussed at length. The prevailing fear among the representatives from all the states was, that the power of taxation might be used to impose burdens upon certain states or sections at the expense of others. It was finally conceded that congress should have the power to levy taxes on imports, and the states should not. It was considered that the power of congress to tax imports could not be used or abused so as to oppress certain states or sections, for such a tax fell on the consumer wherever he resided. But the power to tax exports was prohibited to congress in the original draft of the constitution and was passed by a vote of seven states to four. 1 *Tucker on the Constitution*, pp. 334-335. *Story on the Constitution, sec.* 1015. This clause, however, did not pass without opposition, and several attempts were made to amend it, as by inserting after the word "duty" the words "for the purpose of revenue," and by inserting at the end of it, "unless by consent of two-thirds of the legislature;" both of which propositions were negatived. Judge Story says that the prohibition extends not only to exports, but to the exporter, citing *Brown v. Maryland.*

Mr. Tucker calls attention to the fact that the word "duty" applies to the article of export when it puts

on the character of an export; but lest there might be an evasion of the substantial purpose of the provision, the word "tax" was obviously added. So that the whole clause means that the taxing and duty power of the government should not be laid as a burden on the products of any of the states which are to be exported. 2 *Tucker on the Constitution*, pp. 659-660.

The obvious object of this provision is to prevent any possibility of applying the power to lay taxes so as to regulate commerce injuriously to the interest of any one state. If congress were allowed to lay a duty on exports, it was seen by the framers of the constitution that, inasmuch as the power to tax involves the power to destroy, this power might be used to seriously burden or even destroy the sale of the staple products of some one or more states. The inequality of such a tax would be extreme. In some of the states the whole of their means results from exports, in others very little or nothing is exported, and their wealth is derived from other sources. The burden of a tax on exports would therefore be very unequally distributed. The wealth of South Carolina may depend on exports of cotton, the wealth of Minnesota on exports of wheat, while Vermont or New Hampshire may export substantially nothing. An export tax therefore on cotton, or on wheat, would be borne entirely by the people of the states where those articles are produced. These were 'among the reasons which determined the framers of the constitution to prohibit congress from levying the least tax or duty in any form whatsoever on exports. *Story on the Constitution*, secs. 1014-1015-1016.

The next clause of the constitution is in harmony with this theory. It says:

> "No state shall, *without the consent of congress,* lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage."

In the adoption of the latter section, it was evidently considered that if a state desires to tax its own exports it may safely be permitted by congress to do so, provided the revenue derived therefrom shall be for the use of the treasury of the United States.

C. W. BUNN,

For Plaintiff in Error.

No. 226.

Brf. of King & King for P. C.

Office Supreme Court U.S.
FILED
DEC 6 1900
JAMES H. McKENNEY, Clerk.

Filed Dec. 6

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK,
Plaintiff in Error,
v.
THE UNITED STATES.

No. 226.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

Submitted by
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for other Interested Parties.

IN THE

Supreme Court of the United States.

October Term, 1900.

FRANK M. FAIRBANK,
Plaintiff in Error,
v.
THE UNITED STATES.

No. 226.

Brief of George A. King and William B. King, Attorneys for Others Interested in the Contentions on Behalf of Plaintiff in Error.

The conviction of the plaintiff in error in this cause for failing to affix the stamp required by the provisions of the War Revenue Act of June 13, 1898, to a bill of lading for certain goods accepted by the Northern Pacific Railroad Company, of which he was the agent, for transportation to a foreign country raises the question of the constitutionality of the following provision, constituting a portion of Schedule A of that act, 2 Supp. R. S. 792; 30 Stat. L. 459.

"Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

We insist in support of the plaintiff in error, that this provision is in contravention of the following clause, constituting a portion of article 1, section 9, of the Constitution of the United States:

"No tax or duty shall be laid on articles exported from any State."

It is insisted that this tax, though nominally on the bill of lading, is, by reason of the fact that it is laid upon a necessary concomitant of the exportation of goods, in effect a tax upon the exported articles themselves. This was expressly so decided by this court in the case of *Almy* v. *California*, 24 How. 169. This case, it is true, did not arise under the clause of the Constitution prohibiting Congress from taxing exports from the States, but upon the other clause providing that no State shall "lay any imposts or duties on imports or exports." A statute of California was under consideration in that case imposing a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State of gold or silver, in whole or in part, gold dust, or gold or silver in bars or other form. The court, after remarking that "If the tax was laid on the gold or silver exported every one would say that it was repugnant to the Constitution of the United States," proceeded (p. 174):

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing: for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purpose for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writ-

ing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States."

The court, therefore, held the tax to be one prohibited by the Constitution of the United States because a tax on the export.

This case was decided in 1861. It has always been regarded as authority, and has been referred to and followed in many recent cases.

In the case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647, which was decided in 1888, it was referred to with approval. In that case the agent of the Western Union Telegraph Company at Mobile was prosecuted for refusing to pay the annual license tax imposed by city ordinance on all telegraph companies. It was held that as a large proportion of the business of the company consisted in sending interstate messages it was exempt from taxation on those messages by reason of the exclusive power on the part of Congress to regulate interstate commerce. It was said that a tax on the occupation was in substance a tax on the business, and that the variation of the form did not affect the substance.

In the first of the two opinions delivered on behalf of the majority of the court in the *Income Tax Case, Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, the court referred to this same Almy Case and others involving the same principle in the following language, which seems quite applicable to the tax in question here (pp. 581, 582):

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing a forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure, but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and *Leloup* v. *Mobile*, 127 U. S. 640, it was held that

a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698."

A tax on a bill of lading is, therefore, in substance, a tax on the articles covered by that bill. If a tax on the articles themselves falls within any constitutional prohibition, so must the tax on the bill of lading.

In the enactment of the internal-revenue laws Congress has respected this principle to such an extent as to exempt from taxation goods which are exported, even though subject only to precisely the same tax as those manufactured for domestic consumption. This is done by the allowance of drawback of the internal-revenue tax by §§ 3329, 3386, 3441, etc. of the Revised Statutes. There is some little question whether Congress was obliged to grant any such drawback under the constitutional provision for the reason that the internal-revenue laws, so far at least as concerns distilled spirits, provide, Revised Statutes, § 3248, that "The tax shall attach to this substance as soon as it is in existence as such." Hence, if the tax once attached, it might be questionable whether it could be afterwards avoided by a subsequent exportation, particularly as no provision of the internal-

revenue laws has ever taxed an exported article of domestic production simply because it is exported, as does the provision in the War Revenue Act now under consideration.

This question came up in the case of *Thompson* v. *United States*, 142 U. S. 471, which was a suit brought by the Government on a distiller's bond where part of the spirits were lost by evaporation between the time of the original distillation and the time of exportation. It was held by the Supreme Court that the quantity to be exported must be determined by the regauge at the time of the exportation, and that, as by § 3248 the tax had attached to the spirits originally produced at the time of such production, there could be no escape from the payment of the tax on the difference between that amount and the amount exported, as shown by the regauge at the time of the exportation. Hence, as no attempt was made to tax the portion which was actually exported, the Supreme Court said (p. 478), "We do not think that the constitutional inhibition against the taxation of an article exported from any State is drawn in question." There is, however, a clear intimation that the Supreme Court at least thought that there would have been considerable question of the right of Congress to tax exported spirits, even though taxed at the same rate imposed on spirits not exported.

The proposed tax, however, on foreign bills of lading presents a far stronger case of violation of the constitutional prohibition than would an attempt to enforce a tax on exported distilled spirits. In the latter case the spirits would be taxed only in the same way and to the same extent as other spirits of domestic production, and the tax would not be laid on them because they were exports.

In the present revenue act it is true that there is also a tax on domestic bills of lading by a provision immediately following that on foreign bills of lading. The tax

on domestic bills of lading, however, is only one cent, while on the foreign bills of lading it is ten cents. Looking, as the Supreme Court says we must, at the substance of this tax, rather than at the form, there is one tax imposed on every package of goods shipped from one point in the United States to another in the United States, and another tax of ten times the amount on every package of goods exported from the United States to a foreign country. Granting that Congress may constitutionally tax the transportation of goods by imposing a stamp duty on bills of lading, it certainly can not discriminate against exports by imposing upon bills of lading for exported goods a tax of ten times the amount of that imposed upon shipments from one point to another within the United States. To permit this would be to allow a discrimination against goods because they are exported, thus violating the constitutional prohibition of taxes or duties on exports.

We also claim that the discrimination made by the concluding proviso of Schedule A in favor of the ports from which vessels are dispatched to ports of British North America renders the entire tax on bills of lading unconstitutional. This proviso is as follows (2 Supp. R. S. 795):

> "That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

But by article 1, section 8, of the Constitution of the United States it is provided that "All duties, imposts, and excises shall be uniform throughout the United States."

And by article 1, section 9, "No preference shall be

given by any regulation of commerce or revenue to the ports of one State over those of another."

These clauses were to some extent considered in the case of *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* 18 How. 421, where, after quoting these clauses, it was said (p. 435):

"As to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another."

Now in the present case there is a direct preference given to those ports from which goods may be shipped by water to British North America over ports or places from which similar goods can be exported only by land. There is also a complete lack of uniformity between the duties imposed in one port of the United States and those in another. How, therefore, can it be claimed that the clause in question conforms to the constitutional requirement of want of preference, or to that of uniformity?

On both grounds, therefore, the clause in question must be held unconstitutional and void, and the conviction of the plaintiff in error should be reversed, as based upon an unconstitutional statutory provision.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for others interested in the contentions made on behalf of Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 226.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The question raised is the constitutionality of that provision of the act of June 13, 1898 (30 Stat., 448), known as the "war revenue act," which lays a stamp tax or duty of ten cents upon—

> Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place.

The plaintiff, an agent of the Northern Pacific Railroad Company at Minneapolis, was indicted, tried, and convicted of the offense of issuing a bill of lading for

certain wheat to be exported from Minneapolis to Liverpool, without affixing the 10-cent stamp required by law. The railroad company has carried the case here to test the constitutionality of the law.

THE LAW.

The following are the material parts of the act, the italics being mine:

ADHESIVE STAMPS.

SEC. 6. That from and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of* the several bonds, debentures, or certificates of stock and of indebtedness, *and other documents, instruments*, matters, and things *mentioned and described in Schedule* A of this act, *or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed* by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A.

STAMP TAXES.

BILL OF LADING—EXPORT.

Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents.

* * * * *

CUSTOMS-HOUSE MANIFEST.

Manifest for custom-house entry or clearance of the cargo of any ship, vessel, or steamer for a foreign port—

If the registered tonnage of such ship, vessel, or steamer does not exceed three hundred tons, one dollar.

Exceeding three hundred tons, and not exceeding six hundred tons, three dollars.

Exceeding six hundred tons, five dollars.

* * * * *

PASSAGE TICKET.

Passage ticket, by any vessel from a port in the United States to a foreign port, if costing not exceeding thirty dollars, one dollar.

Costing more than thirty and not exceeding sixty dollars, three dollars.

Costing more than sixty dollars, five dollars.

* * * * *

WAREHOUSE RECEIPT.

Warehouse receipt for any goods, merchandise, or property of any kind held on storage in any public or private warehouse or yard, except receipts for agricultural products deposited by the actual grower thereof in the regular course of trade for sale, twenty-five cents: *Provided, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America.*

It is contended that the stamp tax thus laid upon bills of lading or receipt for goods to be exported violates the

fourth clause of section 9 of article 1 of the Constitution, which reads:

> No tax or duty shall be laid on articles exported from any State.

And it is submitted that the cases of *Brown* v. *Maryland* (12 Wheaton, 419) and *Almy* v. *California* (24 Howard, 169) are controlling and conclusive as against the Government.

ARGUMENT.

I.

I have had occasion more than once to call the attention of the court to the breadth of the taxing power conferred upon Congress by the Constitution. Subject to the exception that Congress can not tax articles exported from any State, and to the limitations that it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of geographic uniformity, the power vested in Congress reaches every subject and may be exercised at discretion. (The License Tax Cases, 5 Wall., 462, 471.)

The question for consideration is, therefore, the meaning and effect of the prohibition,

> No tax or duty shall be laid on articles exported from any State.

Observe carefully the phraseology. Congress is not prohibited from laying a tax or duty on "exports," but on "articles exported from any State." The language chosen indicates the evil the convention intended to prevent, which was the inequality which would result in-

evitably from the selection by Congress of certain articles of export for taxation. At the time the Constitution was being framed there were no articles of export produced generally throughout the Union. The great staples of the South were not produced to any substantial degree in the North. And the reverse was true. It was apparent, therefore, in view of this variety in the production of articles for export, that it would be impossible, in the application of an export duty, to select articles for taxation so as to secure and preserve uniformity of burdens as among the several States. An export tax on cotton would fall on the South, and, with the knowledge then existing, could not be counterbalanced by an export tax on any product of the North. To give Congress the power to lay a tax or duty "on articles exported from any State," meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others.

There is an elaborate discussion of "The grand compromises of the Constitution respecting commerce, exports, and the slave trade," in the recent edition (Harper

& Brothers, 1895) of George Ticknor Curtis's Constitutional History of the United States, chapter 26, volume 1, page 494 et seq. I quote the following (pp. 496, 497):

> At the time of the formation of the Constitution of the United States there was not a single production common to all the States of sufficient importance to become an article of general exportation. Indeed, there were no commodities produced for exportation by so many of the States that a tax or duty imposed upon them on leaving the country would operate with anything like equality even in different sections of the Union. In fact, from the extreme northern to the extreme southern boundary of the Union the exports were so various, both in kind and amount, that a tax imposed on an article the produce of the South could not be balanced by a tax imposed upon an article produced or manufactured at the North. How, for example, could the burden of an export duty on the tobacco of Virginia, or the rice or indigo of South Carolina, be equalized by a similar duty on the lumber, or fish, or flour of other States? Possibly, after long experience and the accumulation of the necessary statistics, an approach toward an equality of such burdens might have been made, but it could never have become more than an unsatisfactory approximation; and while the effect of such a tax at one end of the Union on the demand for the commodity subjected to it might be estimated—because the opportunity for other nations to supply themselves elsewhere might be so precise as to be easily measured—its effect at the other end of the Union, on another commodity, might be wholly uncertain, because the demand from abroad might be influenced by new sources of supply, or might from accidental causes continue to be nearly the same as before.

The object of the prohibition is clearly expressed in Rawle on the Constitution, page 115:

> It has been repeatedly observed, that the leading principle of the whole Constitution is uniformity in respect to the several States, so far as it can be obtained. The natural or artificial products of States are different—to lay a general duty on the exports of rice or cotton, or tobacco, would affect only the Southern States; on flour or grain, principally the Central States, and on the domestic manufactures would operate chiefly on the Northern and Eastern States engaged in them—yet without this restriction perhaps it might have been done.

To the same effect see 1 Story on the Constitution, section 1014.

Mr. Tucker, in his work on the Constitution, says (vol. 1, p. 469, sec. 221):

> An important limitation upon the power of Congress to lay and collect taxes, duties, etc., is expressed in these words: "No tax or duty shall be laid on articles exported from any State." This is a part of the great compromise made between the North and the South, the commercial and the planting States. At that time, as now, a large mass of the exports of the country consisted in the great staples of the South. To have left to Congress the power to tax the staples of the great exporting States of the Union would have enabled the majority of Congress to tax the minority, representing the planting States, to an oppressive extent.

The object of the exception, therefore, was to secure uniformity in matters of taxation among the several States, and the means was the prevention of a tax or duty upon articles exported from any State. To come

within the intent of the prohibition *the tax must fall upon the articles exported*. There must be a selection of articles of export for taxation, with the resultant discrimination against the State or States exporting them.

II.

Having examined briefly the history and purpose of the prohibition, let me for a moment refer to the case of *Almy* v. *California* (24 How., 169), which is relied upon for the purpose of showing that the tax or duty involved in that case was really *a tax upon the articles for which the bill of lading was issued*. The Constitution provides that no State shall without the consent of Congress lay any imposts or duties on imports or exports. The Supreme Court held that the stamp tax imposed by the California act amounted to a duty upon the gold or silver exported, and therefore violated this provision of the Constitution. Subsequently, in *Woodruff* v. *Parham* (8 Wall., 123), this court held that the decision in *Almy* v. *California* was placed on the wrong ground; that as it involved a shipment from San Francisco to New York the tax could not be held invalid as a tax or duty upon exports, because the gold and silver did not constitute exports, not being shipped to a foreign port, but that the tax was invalid because it amounted to a regulation of interstate commerce.

Almy v. *California* was rightfully decided for two reasons:

In the first place, two articles of export were selected to be taxed, namely, gold and silver.

In the second place, the stamp tax laid upon bills of lading for gold or silver was graded according to the value of the gold or silver to be shipped out of the State.

This latter fact does not appear in the case as reported, but Mr. Benjamin, in his brief, gives the language of the California act of April 26, 1858, levying the tax as follows:

> The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment or other material, upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to wit: Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this State, to any point or place without the limits of this State, of any sum, amount, or quantity of gold or silver in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to wit: *for one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one-fifth of one per cent upon the amount or value thereof;* the payment whereof to be included in the bill of lading, contract, or agreement, or obligation for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty, etc.

The California act, therefore, obviously laid a tax upon the articles to be exported, that is, upon the exports, because it selected particular articles, to wit, gold and silver, and taxed them according to the value of the

shipment. The fact that it made use of the bill of lading to lay the tax upon the gold or silver to be exported, is of course immaterial. The substance and not the form controls. (157 U. S., 581.) But this court, in deciding the case of *Almy* v. *California*, pointed out the provisions of the law to which I have referred as showing that the tax was intended to fall on the gold and silver and not on the bill of lading, Chief Justice Taney saying (bottom p. 174):

> In the case before the court, the intention to tax the export of gold and silver in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In this connection, I call the court's attention to the case of *Pace* v. *Burgess, collector* (92 U. S., 372), in which it was held that a stamp tax on tobacco intended for export did not violate the clause of the Constitution which declares that "No tax or duty shall be laid on articles exported from any State." Mr. Justice Bradley

delivered the opinion, in the course of which he said (p. 375):

> The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. *It bore no proportion whatever to the quantity or value of the package on which it was affixed.*

III.

Referring to the language of Chief Justice Taney just quoted, I direct the court's particular attention to the fact that the stamp tax under consideration is not imposed upon any "articles of export," either from any State or from the United States, but simply upon the bill of lading or receipt for goods to be exported. The tax is purely and properly a stamp duty upon the instrument. While the tax upon a warehouse receipt is 25 cents, the tax upon a foreign bill of lading or receipt is only 10 cents. It does not matter what article is to be exported, nor the value of it. Every bill of lading or receipt for goods to be exported, no matter what the goods are, whether cotton, or rice, or wheat, or pork, or manufactured goods, and no matter from what State or port shipped, and no matter what their value, must have affixed the 10-cent stamp.

The tax, therefore, is a perfectly uniform one. It operates equally in every State from which any goods are shipped to foreign ports, and that means uniformly throughout the United States. There is no possibility of discrimination by the selection of particular articles of

export for taxation. The tax, in point of fact, is not a tax upon the articles to be exported, but is a tax upon the bill of lading as the evidence of a transaction.

Many taxes besides stamp duties are collected through the affixing of stamps, but this tax upon foreign bills of lading is a stamp duty proper, as defined by Dowell in his History and Explanation of Stamp Duties, page 7:

> Stamp duties properly so termed have three special characteristics:
>
> 1. They are charged on deeds or other written instruments;
>
> 2. They are collected by means of stamps impressed on or affixed to the instrument charged; and
>
> 3. The instruments charged have reference to, are, in fact, the evidences or records of acts or transactions more or less of a transitory nature, and not periodic in recurrence.

IV.

Having discussed the character of the exaction and shown, I trust, that it is a stamp duty proper, I beg now to call the court's attention to the fact that this tax has been used for over one hundred years, since the days when the men who framed the Constitution were in Congress making laws in order to execute its powers and carry out its purposes.

The act of July 6, 1797, entitled "An act laying duties on stamped vellum, parchment, and paper," provided (1 Stat., 527, 528) for the levying of the several stamp duties following, to wit:

> For any note or bill of lading for any goods or merchandise to be exported, if from one district to

another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents, etc.

It was a stamp tax of two and one-half times the present tax, laid upon exactly the same thing. Respecting this act, this court, speaking by Mr. Justice White (*Knowlton* v. *Moore*, 178 U. S., 41, 56), said:

> The act of 1797 was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.

It does not appear in the debates that it ever occurred to any member of Congress that this stamp tax of 25 cents on foreign bills of lading violated the provisions of the Constitution forbidding Congress to lay a tax or duty on articles exported from any State. The reason is plain.

Stamp duties, as they are known to us, were first imposed in Holland in the year 1624 (Dowell on Stamp Duties, p. 12). The first English stamp act was passed in 1694 (Dowell, p. 15). This act provided for six several stamps or marks, indicating payments of 40s., 5s., 2s. 6d., 1s., 6d., and 1d., the different amounts of charge

for the instruments specified in the act. It was required that every instrument of the description specified should be written on paper (which includes vellum and parchment) previously stamped to denote payment of the proper duty. A variety of instruments were included under the following comprehensive heads, the amount of duty being 6d., namely:

> Charter party, policy of insurance, passport, bond, release, contract or other obligatory instrument, or any protest, procuration, letter of attorney or other notarial certificate (Dowell, pp. 18, 333).

I take it that these broad terms would cover a bill of lading, which is a contract acknowledging the receipt of goods and promising to transport and deliver them at a certain place.

Alluding to the comprehensiveness of the list of instruments liable to the original duties, Smollett observes that the act of 1694 extended to "vellum, parchment, and paper used in almost every kind of intercourse between man and man." (Dowell, pp. 48, 49.) The duties on bills of lading have continued to the present time and are still in force in England. In 1841 they were reduced from 3s. to 6d. (Dowell, p. 58), which is the rate now in force (Dowell, p. 192).

The application of these references to the history of the English stamp duty on foreign bills of lading is obvious. Our fathers who framed the Constitution were acquainted with the fiscal experience of England. They intended to give the Government of the United States authority to raise revenue by imposing stamp duties.

Mr. Luther Martin, in his letter to the legislature of Maryland, says (1 Elliott's Debates, 368):

> By the eighth section of this article, Congress is to have power to lay and collect taxes, duties, imposts, and excises. When we met in convention, after our adjournment, to receive the report of the committee of detail, the members of that committee were requested to inform us what powers were meant to be vested in Congress by the word *duties* in this section, since the word *imposts* extended to duties on goods imported, and by another part of the system no duties on exports were to be laid. In answer to this inquiry, we were informed that it was meant to give the General Government the power of laying stamp duties on paper, parchment, and vellum. We then proposed to have the power inserted in express words, lest disputes might hereafter arise on the subject, and that the meaning might be understood by all who were to be affected by it; but to this it was objected, because it was said that the word *stamp* would probably sound odiously in the ears of many of the inhabitants, and be a cause of objection.

The act of July 6, 1797, was repealed by the act of February 28, 1799, which changed the rate and phraseology of the stamp duty as follows (1 Stat., 622):

> Any note or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, four cents; if to be exported to any foreign port or place, ten cents.

Thus it is to be observed that the rate, ten cents, on a foreign bill of lading has existed from 1799 to the present time, whenever the stamp act has been in force.

The act of April 6, 1802 (2 Stat., 148), repealed all acts levying "internal taxes" in the following terms:

> That from and after the thirtieth day of June next, the internal duties on stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, *any stamped vellum, parchment, and paper*, shall be discontinued, and all acts and parts of acts relative thereto shall, from and after the said thirtieth day of June next, be repealed.

I do not find that the stamp duty on foreign bills of lading was reenacted until the war revenue act of 1862 was passed.

The act of August 2, 1813 (3 Stat., 77), levied stamp taxes upon promissory notes and upon inland and foreign bills of exchange. These duties were repealed by the act of December 23, 1817 (3 Stat., 401). Evidently Congress did not provide in the act of 1813 for the stamp tax upon foreign bills of lading because of the acts placing embargoes upon American vessels, interdicting commerce between England and France and the United States, and more especially the act of April 14, 1812 (2 Stat., 707), which prohibited the exportation of any specie, goods, wares, or merchandise of foreign or domestic growth or manufacture, etc., from the United States or the Territories thereof, in any manner whatever, to any place.

The act of July 1, 1862 (12 Stat., 432) contains, in the ninety-fourth section (p. 475) precisely the provision of the stamp duty on foreign bills of lading that is contained in the war-revenue act of 1898, being as follows:

SCHEDULE B.

STAMP DUTIES.

Bill of lading or receipt (other than charter party), for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents.

Duties similar to those imposed by the present act were also imposed upon manifests and upon passage tickets.

Section 151 of the act of July 30, 1864 (13 Stat., 291), continues in force these taxes or duties, the provision as to foreign bills of lading being in the precise language used in the present act.

These stamp duties were repealed by the act of July 14, 1870 (16 Stat., 257), and were not reenacted until the passage of the war-revenue act of 1898.

I have been informed by the Internal Revenue Bureau of the Treasury Department that the stamp tax on foreign bills of lading was never contested, but always collected.

V.

In the brief filed by Messrs. King it is claimed that the exemption which provides—

That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America—

violates the clause of the Constitution providing that all duties shall be uniform throughout the United States

and also that section which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

In the first place, this provision of the war-revenue act is not involved, because the bill of lading is for goods to be shipped from Minneapolis to Liverpool. But if the proviso were involved and is invalid, the court would so declare and leave the act stand without the exemption. The integrity of the tax is not destroyed by rejecting the exemption. The exemption, however, neither destroys the uniformity of the tax nor provides a preference to the ports of one State over those of another. Manifests, bills of lading, and passage tickets for goods or people on vessels sailing for ports in British North America are exempt from the tax. *It does not matter from what port of the United States the vessel sails.* There is no preference between ports or States of the United States. A vessel sailing from San Francisco to Vancouver, or from New Orleans to Halifax, comes under the exemption as much as a boat plying between Detroit and Windsor, or from Buffalo to Toronto. This answers also the objection as to the lack of uniformity. The tax is exacted uniformly in every place where a bill of lading is issued, and there is no preference given to the ports of one State over the ports of another. I may add that this exemption, in exact words, was in the acts of 1862 and 1864.

VI.

This contention of counsel that a preference is given by this regulation of commerce or revenue to the ports

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of one State over those of another, suggests the consideration that, if necessary, authority might be found for requiring a Government stamp to be placed upon all foreign bills of lading in the power given Congress to regulate commerce among the several States and with foreign nations, as well as in the power given to lay and collect taxes, duties, imposts, and excises.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 3, 1900.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK, PLAINTIFF in error, v. THE UNITED STATES. } No. 226.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

In connection with the quotation from the letter of Mr. Luther Martin to the legislature of Maryland, quoted in my brief, page 15, I call the court's attention to the fact that the so-called "New Jersey plan" submitted by Mr. Patterson authorized Congress to raise revenue, among other ways, "*by stamps on paper, vellum, or parchment.*" (5 Elliott's Debates, p. 191.)

Mr. Martin's statement in his letter, which I have quoted, evidently grew out of his inquiry on August 16, thus reported in 5 Elliott's Debates, page 432:

> Mr. L. MARTIN asked what was meant by the committee of detail in the expression "*duties*" and

"*imposts*." If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

Mr. WILSON. *Duties* are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extends to a variety of objects, *as stamp duties*, etc.

II.

In order to lighten the labor of the court, in case it should deem it desirable to go into the history of the adoption of the clause providing that "No tax or duty shall be laid on articles exported from any State," I print below extracts from the fifth volume of Elliott's Debates on the Constitution.

The Virginia plan, laid before the convention by Mr. Charles Pinckney (on May 29), contained the following provision (5 Ell. Deb., p. 130):

> No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed.

In discussing his proposition "that taxation shall be in proportion to representation," Mr. GOUVERNEUR MORRIS (on July 12) said (id., p. 302):

> Mr. GOUVERNEUR MORRIS admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports* and imports, and on consumption, the rule would be inapplicable.
>
> General PINCKNEY. He was alarmed at what was said (by Mr. Gouverneur Morris) yesterday concern-

ing the negroes. He was now again alarmed at what had been thrown out concerning the taxing of exports. South Carolina has, in one year, exported to the amount of £600,000 sterling, all of which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system, restraining the legislature from taxing exports.

On July 23 General Pinckney used the following language (id., p. 357):

> General PINCKNEY reminded the convention that, if the committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his State to vote against their report.

The report of the Committee of Detail, submitted August 6, contained the following provision (id., p. 379):

> Art. VII, sec. 4. No tax or duty shall be laid by the legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.

On August 8, in discussing the basis of representation, Mr. GOUVERNEUR MORRIS said (id., p. 393):

> The legislature will have indefinite power to tax them (the Northern States) by excises and duties on imports, both of which will fall heavier on them than on the Southern inhabitants; for the bohea tea used by a Northern freeman will pay more tax than the whole consumption of the miserable slave, which consists of nothing more than his physical subsistence and the rag that covers his nakedness. On

the other side, the Southern States are not to be restrained from importing fresh supplies of wretched Africans, at once to increase the danger of attack and the difficulty of defense; nay, they are to be encouraged to it, by an assurance of having their votes in the National Government increased in proportion; and are, at the same time, to have their exports and their slaves exempt from all contributions for the public service.

In discussing the general power of taxation conferred by the Constitution, the following discussion took place on August 16 (id., pp. 432, 433):

Mr. MASON urged the necessity of connecting with the powers levying taxes, duties, etc., the prohibition in article 6, section 4, "that no tax shall be laid on exports." He was unwilling to trust to its being done in a future article. He hoped the Northern States did not mean to deny the Southern this security. It would hereafter be as desirable to the former, when the latter should become the most populous. *He professed his jealousy for the productions of the Southern, or, as he called them, the staple States.* He moved to insert the following amendment:

"*Provided*, That no tax, duty, or imposition, shall be laid by the Legislature of the United States on articles exported from any State."

Mr. SHERMAN had no objection to the proviso here, other than that it would derange the parts of the report, as made by the committee, to take them in such order.

Mr. RUTLEDGE. It being of no consequence in what order points are decided, he should vote for the clause as it stood, but on condition that the subsequent part relating to negroes should also be agreed to.

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Mr. GOUVERNEUR MORRIS considered such a proviso as inadmissible anywhere. It was so radically objectionable that it might cost the whole system the support of some members. He contended that it would not in some cases be equitable to tax imports without taxing exports; and that taxes on exports would be often the most easy and proper of the two.

Mr. MADISON. First, the power of laying taxes on exports is proper in itself; and, as the States can not with propriety exercise it separately, it ought to be vested in them collectively. Secondly, it might with particular advantage be exercised with regard to articles in which America was not rivalled in foreign markets, as tobacco, etc.; the contract between the French farmers-general and Mr. Morris, stipulating that if taxes should be laid in America on the export of tobacco they should be paid by the farmers, showed that it was understood by them that the price would be thereby raised in America, and consequently the taxes be paid by the European consumer. Thirdly, it would be unjust to the States whose produce was exported by their neighbors, to leave it subject to be taxed by the latter. This was a grievance which had already filled New Hampshire, Connecticut, New Jersey, Delaware, and North Carolina, with loud complaints, as it related to imports, and they would be equally authorized by taxes by the States on exports. Fourthly, the Southern States, being most in danger and most needing naval protection, could the less complain if the burden should be somewhat heaviest on them. And, finally, we are not providing for the present moment only; and time will equalize the situation of the States in this matter. He was, for these reasons, against the motion.

Mr. WILLIAMSON considered the clause proposed, against taxes on exports, as reasonable and necessary.

Mr. ELLSWORTH was against taxing exports, but thought the prohibition stood in the most proper place, and was against deranging the order reported by the committee.

Mr. WILSON was decidedly against prohibiting general taxes on exports. He dwelt on the injustice and impolicy of leaving New Jersey, Connecticut, etc., any longer subject to the exactions of their commercial neighbors.

Mr. GERRY thought the legislature could not be trusted with such a power. It might ruin the country. *It might be exercised partially, raising one and depressing another part of it.*

Mr. GOUVERNEUR MORRIS. However the legislative power may be formed, it will, if disposed, be able to ruin the country. He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing tobacco. All countries having peculiar articles tax the exportation of them, as France her wines and brandies. A tax here on lumber would fall on the West Indies, and punish their restrictions on our trade. The same is true of live stock, and, in some degree, of flour. In case of a dearth in the West Indies, we may extort what we please. Taxes on exports are a necessary source of revenue. For a long time the people of America will not have money to pay direct taxes. Seize and sell their effects, and you punish them into revolts.

Mr. MERCER was strenuous against giving Congress power to tax exports. Such taxes are impolitic, as encouraging the raising of articles not meant for exportation. The States had now a right, where their situation permitted, to tax both the imports

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and the exports of their uncommercial neighbors. It was enough for them to sacrifice one-half of it. It had been said, the Southern States had most need of naval protection. The reverse was the case. Were it not for promoting the carrying trade of the Northern States, the Southern States could let the trade go into foreign bottoms, where it would not need our protection. Virginia, by taxing her tobacco, had given an advantage to that of Maryland.

Mr. SHERMAN. To examine and compare the States, in relation to imports and exports, will be opening a boundless field. He thought the matter had been adjusted, and that imports were to be subject, and exports not, to be taxed. He thought it wrong to tax exports, except it might be such articles as ought not to be exported. *The complexity of the business in America would render an equal tax on exports impracticable.* The oppression of the uncommercial States was guarded against by the power to regulate trade between the States. As to compelling foreigners, that might be done by regulating trade in general. The Government would not be trusted with such a power. Objections are most likely to be excited by considerations relating to taxes and money. A power to tax exports would shipwreck the whole.

Concerning the suggested prohibition against the States taxing exports as well as imports, the following was said on August 21 (id., pp. 454, 455, 456):

Mr. LANGDON. By this section the States are left at liberty to tax exports. New Hampshire, therefore, with other nonexporting States, will be subject to be taxed by the States exporting its produce. This could not be admitted. It seems to be feared that the Northern States will oppress the trade of the

Southern. This may be guarded against, by requiring the concurrence of two-thirds or three-fourths of the legislature in such cases.

Mr. ELLSWORTH. It is best as it stands. The power of regulating trade between the States will protect them against each other. Should this not be the case, the attempts of one to tax the produce of another passing through its hands, will force a direct exportation and defeat themselves. *There are solid reasons against Congress taxing exports. First, it will discourage industry, as taxes on imports discourage luxury. Secondly, the produce of different States is such as to prevent uniformity in such taxes. There are indeed but a few articles that could be taxed at all, as tobacco, rice, and indigo; and a tax on these alone would be partial and unjust. Thirdly, the taxing of exports would engender incurable jealousies.*

Mr. WILLIAMSON. Though North Carolina has been taxed by Virginia, by a duty on 12,000 hogsheads of her tobacco through Virginia, yet he would never agree to this power. Should it take place, it would destroy the last hope of the adoption of the plan.

Mr. GOUVERNEUR MORRIS. These local considerations ought not to impede the general interest. There is great weight in the argument, that the exporting States will tax the produce of their uncommercial neighbors. The power of regulating the trade between Pennsylvania and New Jersey will never prevent the former from taxing the latter: nor will such a tax force a direct exportation from New Jersey. The advantages possessed by a large trading city outweigh the disadvantage of a moderate duty, and will retain the trade in that channel. If no tax can be laid on exports, an embargo can not be laid, though in time of war such a measure

may be of critical importance. Tobacco, lumber, and live stock are three objects belonging to different States of which great advantage might be made by a power to tax exports. To these may be added ginseng and masts for ships, by which a tax might be thrown on other nations. The idea of supplying the West Indies with lumber from Nova Scotia is one of the many follies of Lord Sheffield's pamphlet. The state of the country, also, will change, and render duties on exports—as skins, beaver, and other peculiar raw materials—politic in the view of encouraging American manufactures.

Mr. BUTLER was strenuously opposed to a power over exports, as unjust and alarming to the staple States.

Mr. LANGDON suggested a prohibition on the States from taxing the produce of other States exported from their harbors.

Mr. DICKINSON. The power of taxing exports may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles, and forever.. He thought it would be better to except particular articles from the power.

Mr. SHERMAN. It is best to prohibit the national legislature in all cases. The States will never give up all power over trade. An enumeration of particular articles would be difficult, invidious, and improper.

Mr. MADISON. As we ought to be governed by national and permanent views, it is a sufficient argument for giving the power over exports, that a tax, though it may not be expedient at present, may be so hereafter. A proper regulation of exports may, and probably will, be necessary hereafter, and for the same purposes as the regulation of imports, viz. for revenue, domestic manufactures, and procuring

equitable regulations from other nations. An embargo may be of absolute necessity, and can alone be effectuated by the general authority. The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports, by authorizing its citizens to carry their commodities freely into a neighboring State, which might decline taxing exports, in order to draw into its channel the trade of its neighbors. As to the fear of disproportionate burdens in the mere exporting States, it might be remarked that it was agreed, on all hands, that the revenue would principally be drawn from trade, and as only a given revenue would be needed, it was not material whether all should be drawn wholly from imports, or half from those and half from exports. The imports and exports must be pretty nearly equal in every State, and, relatively, the same among the different States.

Mr. ELLSWORTH did not conceive an embargo by the Congress interdicted by this section.

Mr. M'HENRY conceived that power to be included in the power of war.

Mr. WILSON. Pennsylvania exports the produce of Maryland, New Jersey, Delaware, and will, by and by, when the river Delaware is opened, export for New York. In favoring the general power over exports, therefore, he opposed the particular interest of his State. He remarked that the power had been attacked by reasoning which could only have held good in case the General Government had been *compelled*, instead of *authorized*, to lay duties on exports. To deny this power is to take from the common Government half the regulation of trade. It was his opinion that a power over exports might be more effectual than that over imports in obtaining beneficial treaties of commerce.

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Mr. GERRY was strenuously opposed to the power over exports. It might be made use of to compel the States to comply with the will of the General Government, and to grant it any new powers which might be demanded. We have given it more power already than we know how will be exercised. It will enable the General Government to oppress the States, as much as Ireland is oppressed by Great Britain.

Mr. FITZSIMONS would be against a tax on exports to be laid immediately, but was for giving a power of laying the tax when a proper time may call for it. This would certainly be the case when America should become a manufacturing country. He illustrated his argument by the duties in Great Britain on wool, etc.

Colonel MASON. If he were for reducing the States to mere corporations, as seemed to be the tendency of some arguments, he should be for subjecting their exports as well as imports to a power of general taxation. He went on a principle often advanced, and in which he concurred, that a majority, when interested, will oppress the minority. This maxim has been verified by our own legislature (of Virginia). If we compare the States in this point of view the eight Northern States have an interest different from the five Southern States; and have, in one branch of the Legislature, thirty-six votes against twenty-nine, and in the other in the proportion of eight against five. The Southern States had, therefore, ground for their suspicions. *The case of exports was not the same with that of imports. The latter were the same throughout the States; the former very different. As to tobacco, other nations do raise it, and are capable of raising it, as well as Virginia, etc. The impolicy of taxing that article had been demonstrated by the experiment of Virginia.*

> Mr. CLYMER remarked that *every State might reason with regard to its particular productions in the same manner as the Southern States. The Middle States may apprehend an oppression of their wheat, flour, provisions, etc.; and with more reason, as these articles were exposed to a competition in foreign markets not incident to tobacco, rice, etc.* They may apprehend also combinations against them between the Eastern and Southern States, as much as the latter can apprehend them between the Eastern and Middle. He moved, as a qualification of the power of taxing exports, that it should be restrained to regulations of trade, by inserting after the word "duty," article 7, section 4, the words "for the purpose of revenue."

The next day (August 22) the discussion of this section was resumed. It was urged that Congress should be authorized to lay a tax upon slaves imported into this country. The portion of the section relative to the importation of slaves was finally recommitted, this action being preceded by the following (id., p. 460):

> Mr. GOUVERNEUR MORRIS wished the whole subject to be committed, including the clauses relating to taxes on exports and to a navigation act. *These things may form a bargain among the Northern and Southern States.*
>
> Mr. BUTLER declared that he would never agree to the power of taxing exports.

The clause prohibiting the States from taxing imports came before the convention again on August 28, and was amended by including within the prohibition exports as well as imports (id., p. 486). At this time the limitation was added after the word "exports," that the tax,

when levied with the consent of Congress, should be for the use of the United States.

This clause again came before the convention on September 12 (id., p. 538):

> The clause relating to exports being reconsidered, at the instance of Colonel Mason, who urged that the restrictions on the States would prevent the incidental duties necessary for the inspection and safekeeping of their produce, and be ruinous to the staple States, as he called the five Southern States, he moved as follows:
>
> "Provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses in keeping the commodities in the care of public officers before exportation."
>
> In answer to a remark which he anticipated, to wit, that the States could provide for these expenses by a tax in some other way, he stated the inconvenience of requiring the planters to pay a tax before the actual delivery for exportation.
>
> Mr. MADISON seconded the motion. It would at least be harmless, and might have the good effect of restraining the States to *bona fide* duties for the purpose, as well as of authorizing explicitly such duties; though, perhaps, the best guard against an abuse of the power of the States on this subject was the right in the General Government to regulate trade between State and State.
>
> Mr. GOUVERNEUR MORRIS saw no objection to the motion. He did not consider the dollar per hogshead laid on tobacco in Virginia as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption.

The last action on this clause was taken on September 14 (id., p. 545):

> At the end of the clause, "no tax or duty shall be laid on articles exported from any State," was added the following amendment, conformably to a vote on the 31st of August (p. 502), viz:
>
> "No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

III.

In the case of *Aguirre* v. *Maxwell* (3 Blatchford, 140) the validity of an extra tonnage duty, levied upon a cargo exported from New York to Cuba in a Spanish vessel, was sustained in the face of a protest that such duty amounted to a tax or duty on articles exported from a State. The court said:

> The provision of the Constitution (article 1, section 9) that "no tax or duty shall be laid on articles exported from any State," does not apply to the imposition of taxes on foreign vessels. It is within the discretion of Congress to totally inhibit the import or export trade in foreign vessels to or from our ports, or to grant them the privilege of bringing in or carrying out cargoes on such conditions and under such restrictions as may be regarded as most beneficial to the United States. * * * As the power exists, to impose the duty on vessels, the method of determining the amount, whether to be measured by the rate of taxation the cargo would be subjected to, if coming from Cuba or Porto Rico, or by the value of the ship or cargo, in gross or on

> a ratio estimated, as with domestic vessels, by the capacity of the vessel alone, is at the discretion of Congress.

In the case of *Nathan* v. *Louisiana* (8 Howard, 73), a State tax imposed on a broker dealing exclusively in foreign bills of exchange was held not void for repugnance to the constitutional power of Congress to regulate commerce. The court, speaking by Mr. Justice McLean, said (p. 81):

> No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.
>
> A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder when it becomes payable.

Again, page 82:

> For the purposes of revenue, the Federal Government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And

if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 18, 1900.

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Supreme Court of the United States.

No. 226.—October Term, 1900.

Frank M. Fairbank, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Minnesota.

[April 15, 1901.]

On March 7, 1900, plaintiff in error was convicted in the District Court of the United States for the District of Minnesota on the charge of issuing as agent of the Northern Pacific Railway Company an export bill of lading upon certain wheat exported from Minnesota to Liverpool, England, without affixing thereto an internal revenue stamp, as required by the act of June 13, 1898. (30 Stat. 448.) Upon that conviction he was sentenced to pay a fine of $25. His contention on the trial was that that act, so far as it imposes a stamp tax on foreign bills of lading, is in conflict with Article I, section 9, of the Constitution of the United States, which reads: "No tax or duty shall be laid on articles exported from any State." This contention was not sustained by the trial court, and this writ of error was sued out to review the judgment solely upon the foregoing constitutional question.

Section 6 of the act reads:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party, who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule."

In Schedule "A" is this clause:

"Bills of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

Also the following:

"It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other

evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

And this proviso at the end of the schedule:

"*Provided*, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

Mr. Justice BREWER delivered the opinion of the Court.

The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written constitutions are to be regarded as of value, the duty of the court is plain to uphold the Constitution, although in so doing the legislative enactment falls. The reasoning in support of this was in the early history of this court forcibly declared by Chief Justice Marshall in *Marbury* v. *Madison*, (1 Cranch, 137, 177,) and nothing can be said to add to the strength of his reasoning. His language is worthy of quotation:

"The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must

determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

* * * * * *

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts as well as other departments are bound by that instrument."

This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation. That in the enforcement of this rule the decisions, national and State, are not all in harmony is not strange. Conflicts between constitutions and statutes have been easily found by some courts. It has been said, and not inappropriately, that in certain States the courts have been strenuous as to the letter of the State constitution and have enforced compliance with it under circumstances in which a full recognition of the spirit of the constitution and the general power of legislation would have justified a different conclusion. We do not care to enter into any discussion of these varied decisions. We proceed upon the rule often expressed in this court that an act of Congress is to be accepted as constitutional unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution.

In the light of this rule the inquiry naturally is upon what principles and in what spirit should the provisions of the Federal Constitution be construed? There are in that instrument grants of power, prohibitions and a general reservation of ungranted powers. That in the grant of powers there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure has been again and again asserted. The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. Further, by the last clause of sec. 8, art. 1, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This construed on the same principles vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to this court, and it was affirmed that there could be no narrow and technical limitation or construction; that the instrument should be taken as a constitution. In the course of the opinion the Chief Justice said:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 415.)

And thereafter, in language which has become axiomatic in constitutional construction (p. 421)—

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It is true that in that and other kindred cases the question was as to the scope and extent of the powers granted, and the language quoted must be taken as appropriate to that question and as stating the rule by which the grants of the Constitution should be construed.

We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restric-

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tion is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

With this rule in mind we pass to a consideration of the precise question presented. The constitutional provision is "no tax or duty shall be laid on articles exported from any State." The statute challenged imposes on "bills of lading for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign port or place, ten cents." The contention on the part of the government is that no tax or duty is placed upon the article exported; that so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily though ordinarily used in connection with the exportation of goods; that it is a mere stamp imposition on an instrument, and, similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon this alone, but upon a great variety of instruments used in the ordinary transactions of business. On the other hand, it is insisted that though Congress by virtue of its general taxing power may impose stamp duties on the great bulk of instruments used in commerce, yet it cannot in the exercise of such power interfere with that freedom from governmental burden in the matter of exports which it was the intention of the Constitution to protect and preserve. It must be noticed that by this act of 1898 while a variety of stamp taxes are imposed a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit,

and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of ten cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

The power to tax is the power to destroy. And that power can be exercised not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export. To the suggestion that a stamp duty is necessarily small in amount, we reply that the fact is to the contrary. The act by which the stamp tax in question was imposed imposes a like tax on many other instruments, and in some instances graduating the amount thereof by the value of the property conveyed or affected by the instrument taxed. Thus, "each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place" is subject to a stamp tax in the sum of one cent for each hundred dollars of value of the property sold or agreed to be sold. Bills of exchange are likewise taxed by a graduated scale. Deeds or other instruments for the conveyance of land are charged with a stamp tax of fifty cents for each five hundred dollars of value of property conveyed. And so of others. It is a well-known fact that under this graduated system many instruments are subject to stamp duties of large amount. No question has ever been raised as to this power of graduating, and if valid in the cases of bills of exchange, agreements of sale, or conveyances of property, it is equally valid as to bills of lading. The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. By a graduated system, although the tax is called a tax on "the vellum, parchment or paper" upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is "no tax or duty." A ten cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount but one of power. The applicable maxim is "*obsta principiis*," not "*de minimis non curatur lex*."

Counsel for the government in his interpretation of the scope and meaning of this constitutional limitation says:

"To give Congress the power to lay a tax or duty 'on articles exported from any State,' meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others."

This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation, and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export.

In *Nicol* v. *Ames*, (173 U. S. 509,) we had occasion to consider this very act in reference to another stamp duty required by the same schedule, "A," to wit, the clause:

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value

of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, one cent."

We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying (p. 521):

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.

These considerations find ample support in prior adjudications of this court. Thus, in *Almy* v. *California*, (24 How. 169, 174,) it appeared that the State of California had imposed a stamp tax on bills of lading for gold or silver shipped to any place outside of the State, and the contention was that such stamp tax was not a tax on the goods themselves, but the court said:

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported."

It is true that thereafter, in *Woodruff* v. *Parham*, (8 Wall. 123,) it was held that the words "imports" and "exports" as used in the Constitution were used to define the shipment of articles between this and a foreign country and not that between the States, and while therefore that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected. In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon

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the case cited. It was recognized long anterior thereto in *Brown* v. *Maryland*, (12 Wheat. 419.) In that case it appeared that the State of Maryland, in order to raise a revenue for State purposes, required all importers of certain foreign articles to take out a license before they were authorized to sell the goods so imported, and it was held that such license tax, although in form a tax upon the person importing for the privilege of selling the goods imported, was in fact a tax on imports, and that the mode of imposing it by giving it the form of a tax on the occupation of importer merely varied the form without changing the substance. The argument in the opinion in that case, announced by Chief Justice Marshall, remains unanswered. As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance. In the course of his argument Chief Justice Marshall used this illustration:

"All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not the right to do, because it is prohibited by the Constitution." (p. 444.)

The first clause of section 8 of Article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts and excises." Were this the only constitutional provision in respect to the matter of taxation there would be no doubt that tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the *License Tax Cases*, (5 Wall. 462, 471):

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

This proposition is restated by counsel for Government at the commencement of his argument, and is undoubtedly correct. We have hitherto had

occasion to consider the two qualifications—the one that direct taxes must be imposed by the rule of apportionment and the other that indirect taxes shall be uniform throughout the United States. In the *Income Tax Cases, Pollock* v. *Farmers' Loan & Trust Co.*, (157 U. S. 429; 158 U. S. 601,) the constitutional provision as to the apportionment of direct taxes was elaborately considered, and it was held that a tax on the income made up of the rents of real estate and one on the income from personal property were substantially direct taxes on the real estate and the personalty. In the first of these cases, on page 581, discussing the principles of constitutional construction, the Chief Justice said:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, (12 Wheat. 419, 444,) it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, (2 Pet. 449,) it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, (16 Pet. 435,) it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, (24 How. 169,) it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, (7 Wall. 262,) that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, (97 U. S. 566,) that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania*, (122 U. S. 326,) and *Leloup* v. *Mobile*, (127 U. S. 640,) it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of inter-state commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be

sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' (*Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698.)"

In *Knowlton* v. *Moore*, (178 U. S. 41,) we considered the qualification in the matter of uniformity. The question presented was the validity of the inheritance tax imposed by the act of June 13, 1898. (30 Stat. 448.) After showing that the tax was not a direct tax within the constitutional meaning of the term, we examined the objection that it was not uniform throughout the United States, and, after full consideration, held that the uniformity required was a geographical and not an intrinsic uniformity, and was synonymous with the expression "to operate generally throughout the United States." While upon some of the questions in that case there was a difference of opinion, yet concerning the construction of the uniformity clause the Justices who took part in the decision were agreed. After discussing the construction of the uniformity clause, Mr. Justice White, speaking for the court, proceeded to show that the tax in question did not violate such uniformity. There was no suggestion that the qualification could be disregarded or limited in any legislation; the opinion proceeded upon the assumption that the uniformity provision was an absolute restriction on the power of Congress, and the argument was to demonstrate that the tax in question in no manner conflicted with either the letter or spirit of such restriction. If it had been in the mind of the court that such restriction as to uniformity could be evaded by a mere change in the form of legislation the opinion could have been less elaborate and the difficulties of the case largely avoided.

We have referred to these cases for the purpose of showing that the rule of construction of grants of powers has been also applied when the question was as to restrictions and limitations. Other cases may also well be referred to in this connection.

In *Robbins* v. *Shelby County Taxing District*, (120 U. S. 489,) the question presented was whether an act of the State of Tennessee, requiring "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby County, offering for sale, or selling goods, wares or merchandise therein by sample," to pay a certain tax to the county trustee, could be enforced as to those drummers who were engaged simply in soliciting business in the State of Tennessee in behalf of citizens of other States. It was held that it could not, that such act of solicitation, being a matter of interstate commerce, was, therefore, beyond the power of the State to regulate. In the opinion, Mr. Justice Bradley, speaking for the court, said:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

"The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden on interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things." (p. 494.)

The scope of this argument is that inasmuch as interstate commerce can only be regulated by Congress, and is free from State interference, State legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, cannot be sustained. Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

In *Monongahela Navigation Co.* v. *United States*, (148 U. S. 312,) it appeared that Congress had passed an act authorizing the condemnation of a lock and dam known as the Upper Lock and Dam on the Monongahela River, belonging to the navigation company, with a proviso, "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated"—the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the Fifth Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived, the court saying:

"Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon a price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation." (p. 336.)

In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

In *Boyd* v. *United States*, (116 U. S. 616,) the fifth section of the act of June 22, 1874, (18 Stat. 186,) which authorized a court of the United States in revenue cases, on motion of the district attorney, to require the defendant or the claimant to produce in court his private books, invoices and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those amendments, and in respect to this the court said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" (p. 635.)

On the other hand, *Pace* v. *Burgess, Collector*, (92 U. S. 372,) is cited as an authority against these conclusions; but an examination of the case shows that this is a mistake. The act of 1868, (15 Stat. 125,) imposed certain taxes on the manufacture of tobacco for consumption or use, required as evidence of the payment of such taxes the affixing of revenue stamps to the packages, and forbade the removal of any tobacco from the factory without payment of the taxes and affixing of the stamps. It further provided that tobacco might be manufactured for export and exported without payment of any tax. Sections 73 and 74, page 157, are the sections making provision for such export, and authorized the removal of the tobacco from the manufactory to certain designated warehouses at ports of entry upon the giving of suitable bonds. The latter part of section 74 reads:

"All tobacco and snuff intended for export, before being removed from the manufactory shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation."

This act was amended in 1872, (17 Stat. 230,) the amendments to sections 73 and 74 being found on page 254; but they have no significance in respect to the present question. Now, it was the cost of these removal stamps which was complained of as in conflict with the constitutional provision against a tax or duty upon exports, but the contention was overruled, the court saying (pp. 374, 375, 376):

"The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'no tax or duty shall be laid on articles exported from any State.' But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precautions were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us we think it is used for quite a different purpose from that of imposing a tax or duty; indeed, it is used for the very contrary purpose—that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold dust

exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy* v. *The State of California*. (24 How. 169.) In all such cases no one could entertain a reasonable doubt on the subject."

Obviously, this opinion, taken as a whole, makes against rather than in favor of the contention of counsel for the Government. Its argument is to the effect that the stamp required was in no proper sense a tax for revenue; that there was no burden of any kind on the export; that it was something to facilitate rather than to hinder exports; that it was only a means of identification and to enable parties to remove their tobacco from the manufactory to the warehouse, and that the sum demanded was simply a matter of compensation for services rendered. The statute itself declared that the twenty-five cents was to be paid "for the expense attending the providing and affixing" of the stamps. This clearly excludes the idea that any tax or duty was intended to be imposed, and the opinion notes the fact that the difficulty arises because ordinarily stamps are used for the purpose of duty or tax, says that we must always regard things rather than names, and that this stamp was not used for the purpose of tax or duty but only for identification and to prevent frauds on the government. If it had been supposed that a stamp tax could properly be charged, the line of argument would have been entirely different. In the case before us the stamp is distinctly for the purpose of revenue and not by way of compensation for services rendered, so that the question is whether revenue can be collected from exports by changing the form of the tax from a tax on the article exported to a tax on the bill of lading which evidences the export.

Again, it is said that if this stamp duty on foreign bills of lading cannot be sustained it will follow that tonnage taxes and stamp duties on manifests must also fall. The validity of such taxes is not before us for determination, and, therefore, we must decline to express any opinion thereon, and yet it may be not improper to say that even if the suggested result should follow it furnishes no reason for not recognizing that which in our judgment is the true construction of the constitutional limitation. Mingling in one statute two or three unconstitutional taxes cannot be held operative to validate either one, and if the reasoning we have stated and followed in reaching the conclusion in this case shall also lead to the result that such taxes are invalid, it of itself does not weaken the force of the reasoning or justify us in departing from its conclusions. But we may be permitted to suggest, without deciding, that there may be a valid difference as indicated by the decisions of this court in respect to interstate commerce. It has been distinctly held that no State could by a license or otherwise impose a burden on the business of interstate commerce. (*Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, and cases cited in the opinion.) And yet that decision was followed by decisions that it might

tax the vehicles and property employed in interstate commerce so long and so far as they were a part of the property of the State. (*Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and cases cited in the opinion.) This difference may have significance in respect to these other taxes. As heretofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered.

Another matter pressed upon our attention, which deserves and has received careful consideration, is the practical construction of this constitutional provision by legislative action. On July 6, 1797, an act was passed entitled "An act laying duties on stamped vellum, parchment and paper," (1 Stat. 527,) which contained this clause:

"Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents," &c. (p. 528.)

This was changed by the act of February 28, 1799 (1 Stat. 622,) but only as to the amount. On April 6, 1802, (2 Stat. 148,) a repealing act was passed. Again, on July 1, 1862, (12 Stat. 432,) a similar stamp duty was imposed on foreign bills of lading, which was continued by the act of June 30, 1864, (13 Stat. 218, 291,) finally repealed by the act of June 6, 1872, (17 Stat. 230, 256); and then followed the act in question. In *Knowlton* v. *Moore*, *supra*, in which the inheritance tax was considered, the significance of this practical construction by legislative action was referred to, and on pages 56, 57 we said:

"The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within State authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question."

And again, when the construction of the uniformity clause was being considered (p. 92):

"But one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the State constitutions,

results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced."

That was not the first case in which this matter has been considered by this court. On the contrary, it has been often presented. See in the margin a partial list of cases in which the subject has been discussed.* An examination of the opinions in those cases will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that if there were doubt in reference thereto the practical construction placed by Congress, or the department charged with the execution of the statute, was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long continued construction by the officials charged with the execution of the statute; and, third, those in which the court, noticing the fact of a long continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute.

The first class is illustrated by *Cohens* v. *Virginia*, (6 Wheat. 264.) There the question presented was the jurisdiction of this court over proceedings by indictment in a State court for a violation of a State statute. In an elaborate argument Chief Justice Marshall sustained the jurisdiction, and then added (p. 418):

*Stuart *v.* Laird, 1 Cranch, 299; Martin *v.* Hunter's Lessee, 1 Wheat. 304, 351; Cohens *v.* Virginia, 6 Wheat. 264, 418; Edwards's Lessee *v.* Darby, 12 Wheat. 206, 210; United States *v.* State Bank of North Carolina, 6 Pet. 29, 39; United States *v.* Macdaniel, 7 Pet. 115; Prigg *v.* Commonwealth of Pennsylvania, 16 Pet. 539; Union Insurance Company *v.* Hoge, 21 How. 35, 66; United States *v.* Alexander, 12 Wall. 177, 181; Peabody *v.* Stark, 16 Wall. 240, 243; Dollar Savings Bank *v.* United States, 19 Wall. 227, 237; Smythe *v.* Fiske, 23 Wall. 374, 382; United States *v.* Moore, 95 U. S. 760, 763; Swift Company *v.* United States, 105 U. S. 691, 695; Hahn *v.* United States, 107 U. S. 402, 406; United States *v.* Graham, 110 U. S. 219, 221; Lithographic Company *v.* Sarony, 111 U. S. 53, 57; Brown *v.* United States, 113 U. S. 568, 571; Cooper Manufacturing Company *v.* Ferguson, 113 U. S. 727, 733; The Laura, 114 U. S. 411, 416; United States *v.* Philbrick, 120 U. S. 52, 59; United States *v.* Hill, 120 U. S. 169, 182; United States *v.* Johnston, 124 U. S. 236, 253; Robertson *v.* Downing, 127 U. S. 607, 613; Merritt *v.* Cameron, 137 U. S. 542, 55[illegible]; Schell's Executors *v.* Fauché, 138 U. S. 562, 570; United States *v.* Alabama F. R. Co., 142 U. S. 615, 621; McPherson *v.* Blacker, 146 U. S. 1; United States *v.* Ta[illegible]ner, 147 U. S. 661, 663; United States *v.* Union Pacific Ry. Co., 148 U. S. 562, 572; United States *v.* Alger, 152 U. S. 384, 397; Webster *v.* Luther, 163 U. S. 331, 342; Wisconsin Central R. R. Co. *v.* United States, 164 U. S. 190, 205; Hewitt *v.* Schultz, 180 U. S. 139–156.

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration."

And in support of that referred to the writings in The Federalist, which were presented before the adoption of the Constitution, and were generally recognized as powerful arguments in its favor; also to the Judiciary Act of 1789, (1 Stat. 73,) the decisions of this court and the assent of the courts of several States thereto, saying (p. 421):

"This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

Again, in *United States* v. *State Bank of North Carolina*, (6 Pet. 29, 39,) Mr. Justice Story, in like manner, said:

"It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the second class may be placed *Stuart* v. *Laird*, (1 Cranch, 299;) *Lithographic Company* v. *Sarony*, (111 U. S. 53,) in which last case Mr. Justice Miller, speaking for the court, used this language (p. 57):

"The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

See also *The Laura*, (114 U. S. 411;) *United States* v. *Philbrick*, (120 U. S. 52, 59;) *United States* v. *Hill*, (Id. 169, 182;) *Robertson* v. *Downing*, (127 U. S. 607, 613,) and *Schell's Executors* v. *Fauché*, (138 U. S. 562, 572,) in which it was said:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The third class is the largest. While the language used by the several Justices announcing the opinions in these cases is not the same, the thought is alike. Thus, in *Swift Company* v. *United States*, (105 U. S. 691, 695,) Mr. Justice Matthews said:

"The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt."

In *United States* v. *Graham*, (110 U. S. 219, 221,) Chief Justice Waite thus stated the law:

"Such being the case it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous."

In *United States* v. *Tanner*, (147 U. S. 661, 663,) it was said by Mr. Justice Brown:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. (*United States* v. *Graham*, 110 U. S. 219; *Swift Company* v. *United States*, 105 U. S. 691.) It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

In *United States* v. *Alger*, (152 U. S. 384, 397,) Mr. Justice Gray used this language:

"If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In *Webster* v. *Luther*, (163 U. S. 331, 342,) Mr. Justice Harlan stated the rule in these words:

"The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. (*Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34; *United States* v. *Healey*, 160 U. S. 136, 141.) But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

From this résumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no

doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition. The judgment of the District Court will be reversed and the case remanded with instructions to grant a new trial.

Mr. Justice HARLAN, Mr. Justice GRAY, Mr. Justice WHITE and Mr. Justice MCKENNA dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 226.—October Term, 1900.

Frank M. Fairbank, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Minnesota.

[April 15th 1901.]

Mr Justice Harlan (with whom concurred Mr. Justice Gray, Mr. Justice White and Mr. Justice McKenna) dissenting.

By the act of June 30th 1898, *c.* 448, imposing certain stamp duties, it was declared that there should be levied, collected and paid the sum of *ten* cents "*for* and *in respect of* the *vellum, parchment or paper* upon which . . shall be written or printed by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, . . bills of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place. . . *Provided*, That the stamp duties imposed by the foregoing Schedule on manifests, bills of lading and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America." 30 *Stat.* 448, 451, 458, 459, 462, §§ 6 *and* 24, *Schedule A.*

It is contended that this stamp duty is forbidden by the clause of the Constitution declaring that "no tax or duty shall be laid on *articles* exported from any State," *Art.* I, § 9; and that the stamp duty here in question was, within the meaning of that instrument, a tax or duty on the wheat received by the Northern Pacific Railway Company to be carried from Minnesota to Liverpool, and for which the company issued its bill of lading.

We are of opinion that this contention cannot be sustained without departing from a rule of constitutional construction by which this court has been guided since the foundation of the Government. Let us see to what extent Congress has exercised the power now held not to belong to it under the Constitution.

As early as July 6th 1797 Congress passed an act entitled "An act laying duties on stamped vellum, parchment and paper." By the first section of that act it was provided that from and after the 31st day of December thereafter there should be "levied, collected and paid through-

out the United States the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . any note or bill of lading for any goods or merchandise . . to be exported to any foreign port or place, twenty-five cents." 1 *Stat.* 527, 528, *c.* 11, § 1. The same act provided: "That if any person or persons shall write or print, or cause to be written or printed upon any unstamped vellum, parchment or paper, (with intent fraudulently to evade the duties imposed by this act,) any of the matters and things for which the said vellum, parchment or paper is hereby charged to pay any duty, or shall write or print, or cause to be written or printed any matter or thing, upon any vellum, parchment or paper, that shall be marked or stamped for any lower duty than the duty by this act payable, such person so offending shall for every such offense forfeit the sum of one hundred dollars." *Id.* § 13.

By an act approved December 15th 1797, *c.* 1, it was provided that the duties prescribed by the act of July 6th 1797 should be levied, collected and paid from and after June 30th 1798, and not before. 1 *Stat.* 536.

The above act of July 6th 1797 was amended in certain particulars by an act approved March 19th 1798, *c.* 20, by which certain provisions were made for furnishing the vellum, parchment or paper required by the former act to be stamped and marked. 1 *Stat.* 545.

It not having occurred to any of the great statesmen and jurists who were connected with the early history of the Government that enactments such as that of July 6th 1797 violated the Constitution, Congress passed another act on the 28th day of February 1799, *c.* 17, imposing a duty of ten cents "on every skin or piece of vellum or parchment on which shall be written or printed any or either of the instruments following, to wit: . . Any note or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise . . to be exported to any foreign port or place." 1 *Stat.* 622.

Congress, still supposing that it was acting within the limits of its powers under the Constitution, again, by the act of April 23d 1800, *c.* 31, amended and extended that of July 6th 1797. By the latter act a general stamp office was established, and provision was made, among other things, for the punishment, by fine and imprisonment, of those who, with the intent to defraud the United States of any of the duties laid by the original act of 1797, counterfeited or caused to be forged or counterfeited any vellum, parchment or paper provided for by Congress under that act. 2 *Stat.* 40, 42. The act of April 23d 1800 was amended by an act passed March 3d 1801, *c.* 19, by which it was provided that deeds, instruments or writings, issued without being stamped, could be thereafter stamped and

become valid and available as if they had been originally stamped as required by law. 2 *Stat.* 109.

By an act approved April 6th 1802, *c.* 17, internal duties on "stamped vellum, parchment and paper" were discontinued—for the reason, doubtless, that the further imposition of such duties was unnecessary. 2 *Stat.* 148.

As late as March 3d 1823 Congress passed a general statute in execution of the act of April 23d 1800 establishing a general stamp office. 3 *Stat.* 779.

By an act approved July 1st 1862, *c.* 119, Congress provided that there should be levied, collected and paid a stamp duty of ten cents "for and in respect of the vellum, parchment or paper" upon which was written or printed any "bill of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place." 12 *Stat.* 432, 475, 479, 480, §§ 94, 110. By the act of June 30th 1864, *c.* 173, the stamp duties provided by the act of July 1st 1862 were continued in force until August 1st 1864, and it was provided that from and after the latter date there should be levied, collected and paid a stamp duty of ten cents "for and in respect of the vellum, parchment or paper upon which shall be written or printed" any "bill of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place." 13 *Stat.* 223, 291, 292, 298, §§ 151, 170, *Schedule B.* But by an act approved June 6th 1872, *c.* 315, all the taxes imposed under and by virtue of Schedule B of section 170 of the act of June 30th 1864, and the several acts amendatory thereof, were abrogated from and after October 1st 1872, excepting only the tax of two cents on bank checks, drafts or orders. 17 *Stat.* 230, 256.

We have referred somewhat in detail to the above enactments for the purpose of bringing out clearly the fact that stamp duties were imposed specifically for and in respect of the vellum, parchment or paper upon which was written or printed a bill of lading for goods or merchandise to be exported to foreign countries, and had no reference to the kind, quality or value of the property covered by such bill of lading. Congress *ex industria* declared in each act that the tax was for and in respect of the vellum, parchment or paper upon which the bills of lading were written or printed. This fact plainly distinguishes the present case from *Almy* v. *State of California*, 24 *How.* 169, which involved the validity, under the Constitution of the United States, of a statute of California, passed April 26th 1858, imposing a stamp tax on bills of lading for the transportation from that State, to any port or place without the State, of any quantity of gold or silver coin, in whole or in part, gold dust, or gold or silver in bars or other form. This court, after observ-

ing that a tax laid on the gold or silver exported from California was forbidden by the clause declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," said: "In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only on bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax upon the gold and silver exported, while all the other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other. In the judgment of this court the State tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to." This interpretation was demanded by the words of the statute of California which provided: "The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment or other material, upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to wit: Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this State, to any point or place without the limits of this State, of any sum, amount or quantity of gold or silver in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to wit: *for one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one-fifth of one per cent. upon the amount or value thereof*, the payment whereof to be included in the bill of lading, contract, or agreement, or obligation for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty," &c. *Stat. Cal.* 1858, *p.* 305; *Id.* 1857, *p.* 304.

The difference between the California statute and the act of Congress is manifest. By the former the amount of the tax upon bills of lading depended upon the value of the gold or silver specified in them and exported, while the latter imposed a tax of only ten cents on the vellum, parchment or paper upon which was written or printed a bill of lading for property to be exported, without regard to its quantity or value. If Congress had graduated the stamp duty according to the quantity or value of the articles

exported, there might have been ground for holding that the purpose and the necessary result was to tax the property and not the vellum, parchment or paper on which the bill of lading was written or printed.

This rule of interpretation was recognized in *Pace* v. *Burgess, Collector*, 92 *U. S.* 372, 375. That case arose under the act of July 20th 1868, c. 176, imposing duties on distilled spirits and tobacco, and for other purposes, and which provided that "all tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package to be stamped shall be paid to the collector on making the entry for such transaction." 15 *Stat.* 125, 158, § 74. The contention was that the statute imposed a tax or duty in violation of the constitutional prohibition of taxes or duties "on articles exported from any State." *Art.* 1, § 9. This court overruled that contention upon the ground that it was apparent from the statute that "the stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo." The court added—and this is important in its bearing on the case before us: "It [the stamp] bore *no proportion whatever to the quantity or value of the package on which it was affixed.* These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business." As in *Pace* v. *Burgess, Collector*, so in the present case the stamp duty imposed was without any reference to the quantity or value of the property.

In our judgment, the small stamp duty imposed by the act of 1898 specifically upon the vellum, parchment or paper upon which was written or printed a bill of lading for property, of whatever value, intended for export, cannot be regarded as a duty on the property itself.

It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of ten cents upon the vellum, parchment or paper on which is written a bill of lading for articles to be exported from a State, it could as well impose a duty of five thousand dollars and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for

centuries, a well-defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of the property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of five thousand dollars for and in respect of the vellum, parchment or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp tax laws, and that the purpose and necessary operation of such legislation was, in violation of the Constitution, to tax the articles specified in such bill and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported.

There is another view of this case which presents considerations of a serious character. In the opinion just rendered it is conceded that a stamp tax on vellum, parchment or paper on which is printed or written a bill of lading of goods to be shipped out of the United States, could be sustained, if regard be had to the practice of the Government since its organization. But that practice, covering more than a century, must, it seems, go for naught.

In *Stuart* v. *Laird*, 1 *Cranch*, 299, 309, (1803) the question arose whether the Justices of this court had the right, although authorized by an act of Congress, to sit as Circuit Judges, not having been appointed as such nor having any distinct commissions for that purpose. This court, speaking by Mr. Justice Patterson, said: "To this objection, which is of recent date, it is sufficient to observe, that *practice and acquiescence under it* for a period of several years, commencing with the organization of the judicial system affords an irresistible answer, and has indeed *fixed the construction*. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question *is at rest*, and ought not now to be disturbed."

In *Prigg* v. *Commonwealth of Pennsylvania*, 16 *Pet.* 541, 608, 621, this court, speaking by Mr. Justice Story, after referring to the section of the act of February 12th 1793 requiring a certificate to be given, under certain circumstances, to the owner of a fugitive slave apprehended under that act, said: "So far as the judges of the courts of the United States have been called upon to enforce it and to grant the certificate required by it, it is believed that it has been uniformly recognized as a binding and valid law; and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our judgment, entitle the

question to be considered at rest; unless, indeed, the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation and of national operations. Congress, the executive and the judiciary have, upon various occasions, acted upon this as sound and reasonable doctrine"—citing among other cases that of *Stuart* v. *Laird*, 1 *Cranch*, 299.

In *The Laura*, 114 *U. S.* 411, 416, in which the question arose as to the validity of an act of Congress approved March 3d 1797, 1 *Stat.* 506, *c.* 13, authorizing the Secretary of the Treasury to remit a forfeiture of property after final sentence of condemnation, this court said: "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controled. Of course, the question is at rest, and ought not now to be disturbed.' *Stuart* v. *Laird*, 1 *Cranch*, 308. The same principle was announced in *Lithographic Co.* v. *Sarony*, 111 *U. S.* 53, 57, where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said: 'The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the Convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is [almost] *conclusive*.'" This quotation in *The Laura* from the opinion in Sarony's case was defective in that it omitted, by mistake in printing, the word "almost" before "conclusive." But the error does not affect the substance of the decision rendered, as the court, in the case of *The Laura*, approved and reaffirmed what was said in *Stuart* v. *Laird*.

In *Schell's Executors* v. *Fauche*, 138 *U. S.* 562, this court, speaking by Mr. Justice Brown, cited with approval what is above quoted from *Stuart* v. *Laird*, adding: "In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officers whose duty it is to carry the law into effect, is universally held to be *controlling*."

In *McPherson* v. *Blacker*, 146 *U. S.* 1, 27, this court, speaking by the present Chief Justice, said: "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent

practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the *contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled. Stuart* v. *Laird*, 1 *Cranch*, 299, 309."

Cases almost without number could be referred to in which the same principles of constitutional construction are announced as in the cases above cited. In the latest case—*Knowlton* v. *Moore*, 174 *U. S.* 41, 56—this court had occasion in its review of taxing legislation by Congress, to refer to the act of July 6th 1797, the very act in which Congress first imposed a stamp duty on vellum, parchment or paper upon which was written a bill of lading for articles to be exported. Touching the objection that Congress could not constitutionally impose, as by that act was imposed, a tax on inheritances or legacies, this court, speaking by Mr. Justice White, said: "It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the Government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the Convention which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within State authority."

Many cases have been cited which hold that the uniform, contemporaneous construction by *executive* officers charged with the enforcement of a *doubtful* or *ambiguous* law is entitled to great weight and should not be overturned unless it be plainly or obviously erroneous. If such respect be accorded to the action of mere executive officers, how much greater respect is due to the legislative department when it has at different periods in the history of the country exercised a power as belonging to it under the Constitution, and no one in the course of a century questioned the existence of the power so exercised. Besides, we have here a question of the consti-

tutional power of Congress under the Constitution, and not a question relating merely to the practice of executive officers acting under a law susceptible of different interpretations. No one of the acts of Congress imposing a stamp duty on the vellum, parchment or paper on which a bill of lading of articles to be exported was written, can be classed among laws that are doubtful or ambiguous in their meaning. No person, however skilful in the use of words, who attempts to frame a statute imposing a stamp duty, pure and simple, on such vellum, parchment or paper, could possibly employ language expressing that thought more distinctly than Congress has done in the several acts relating to stamp duties of that character. The words of those acts are clear, and are capable of but one construction; and the court determines the case upon the ground alone of want of power in Congress to impose the stamp duty in question.

Without further discussion or citation of authorities, we submit that the denial, at this late day, of the power of Congress to impose what is strictly a stamp duty on the vellum, parchment or paper upon which is written or printed a bill of lading for goods to be exported to a foreign port or place, involves not only a departure from canons of constitutional construction by which it has been controlled for more than a century, but, in the words of *Prigg* v. *Commonwealth*, delivers the interpretation of the Constitution "over to interminable doubt throughout the whole progress of legislation and of national operations." Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart* v. *Laird*, and in other cases, the question should be considered at rest.

In view of the importance of the case, we have deemed it appropriate to state the reasons of our dissent from the opinion and judgment just rendered.

True copy.

Test:

Clerk Supreme Court, U. S.